

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for
reimbursement under the PECFA
Program by**

MADISON HEARING OFFICE
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Earl T. Robinson
Outokumpu Copper, Inc.

**Hearing Number: 97-163
Re: PECFA Claim #53143-4495-20**

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

STATE HEARING OFFICER:
Karen L. Godshall

DATED AND MAILED:
February 8, 1999

MAILED TO:

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BEFORE THE

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF:

Earl T. Robinson
Outokumpu Copper, Inc.
70 Sayre Street
Buffalo, New York 14207-0299

PECFA Claim 53143-4495-20
PECFA Hearing No. 97-163

In September of 1997, a PECFA (Petroleum Environmental Cleanup Fund Act) decision was issued, denying reimbursement to the appellant on the basis that the tank system was not within the scope of the PECFA program. An appeal was filed to that decision in a timely manner. In lieu of hearing on the matter, the parties agreed to allow a decision to be made on a specific issue based on stipulated facts and written argument rather than a hearing record. That stipulation and those arguments now having been received and considered, the hearing officer makes the following

PROPOSED FINDINGS OF FACT

(The following proposed findings of fact are not intended to replace the stipulations of fact already a part of the record, but only to provide brief background information necessary to a reading of the proposed analysis, decision and order.)

The appellant is the owner of a Wisconsin property for which he is seeking PECFA reimbursement for environmental cleanup costs. At that property site were contaminated soils requiring remediation efforts. The appellant contends that the contamination was the result of leaks from PECFA-eligible tanks, identified as tanks numbered 6, 7, 8, 9, 10, 11, 12, and T-88. Tanks 6 through 12 were used to store hot working oil (black oil), waste oil, lubricants, hydraulic oil and fuel oil, which were used to fuel the annealing and other metallurgical furnaces at the site. Tank T-88 was used to store reclaimed rolling oil. The oil in that tank was to be used as fuel oil in an emergency on the site.

ISSUE

Does the term "heating oil" as it is defined at Sec. ILHR 47.015(16), Wis. Adm. Code (incorporating ILHR 10.01(43), Wis. Adm. Code by reference), include fuel oil used to fuel furnaces used for manufacturing or production purposes and not used to heat a building?

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

Sec. 101.143(l)(fg), Stats. (in part) The term [petroleum product storage system] does not include tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tanks owned by school districts and heating oil tanks owned by technical college districts and except as provided in sub.(4)(ei).

Sec. ILHR 47.015(16), Wis. Admin. Code (in part) [Heating oil is defined as]...petroleum that is No. 1, No. 2, No. 4-light, No. 4-heavy, No. 5-light, No. 5-heavy, and No. 6 technical grade of fuel oil; other residual fuel oils, including Navy Special Fuel Oil and Bunker C; and other fuels when used as substitutes for one of these fuel oils used for heating purposes. Heating oil is typically used in the operation of heating equipment, boilers or furnaces.

Sec. ILHR 47.03(2)(a)6, Wis. Admin. Code (in part) [Costs not eligible for Reimbursement under the PECFA program include]...costs for contamination cleanups from non-residential heating oil or boiler tank systems and discharges from mobile fueling tanks or fuel storage tanks on vehicles.

PROPOSED ANALYSIS

The PECFA statutes and rules provide that PECFA funds are not available for reimbursement of non-residential heating oil cleanup costs. It must therefore be decided whether fuel oil used to fuel furnaces used for manufacturing or production purposes and not used to heat buildings falls within the definition of "heating oil".

The administrative code provision which defines heating oil has several factors. First, specific types of oil are defined as heating oil, regardless of the use to which they are put. Although the parties' arguments view the stipulations differently, with the appellant arguing that the tanks in question did not contain any of the specifically defined types of oil, and the department arguing that they did or may have, it must be assumed for purposes of this analysis that the tanks did not contain any of the specifically listed fuels. If the tanks did contain the enumerated fuels, which are by definition heating oil, then no further analysis is necessary, and the exclusion applies, making any resulting cleanup costs non-reimbursable.

Similarly, it must be assumed that the tanks did not contain "residual fuel oils", which would again be automatically defined as heating oil, making any cleanup resulting from such sources non-reimbursable.

The issue then becomes of whether fuel oils, other than those specifically enumerated in the rule by number or by definition as residual fuel oils, are heating oil when used for manufacturing and production purposes. It is clear from the stipulations and arguments that the oils in the tanks were intended for consumptive use on the premises.

The third type of product which is defined as heating oil by rule is fuel which is used as a substitute for one of the enumerated fuels and for heating purposes. In any given scenario, a question of fact arises as to whether the fuel is used as a substitute for one of the enumerated fuels. Under the stipulations of the instant case, there is no reason to suppose that the fuels in question were used as a substitute for those fuels. The appellant in its manufacturing operation has presumably chosen fuels for their specific application to its manufacturing processes. Those fuels are consumed, or "burned", not to heat the production facility in general, nor to provide heat for workers in the facility, but for a specific production need. The mere fact that the fuels are consumed by burning, and that the burning will of

necessity create some heat, does not mean that the purpose of the consumption is heating. If the definition of heating were so broad as to encompass all fuel consumption which results in some heat production, then all fuel consumption would of necessity be defined as being for heating purposes. The department's arguments for such a broad reading of the definition of "heating purposes" is not persuasive.

The briefs of both parties tend to confuse the issue by seeking a resolution of a general issue, while at the same time attempting to apply an analysis to a specific situation. What has been asked is a general question as to the applicability of the heating oil exclusion to fuels used for manufacturing purposes. What is appropriate as a response is one which answers that general question. The application of that general answer to the specific situation of the appellant cannot be resolved without the resolution of certain other factual matters, which may arise in further proceedings, but which are not before this decision-maker.

PROPOSED ULTIMATE FINDING

The hearing officer therefore finds that fuel oils which are used to fuel furnaces used for manufacturing or production purposes and not used to heat buildings are "heating oil" as defined at Sec. ILHR 47.015(16) only if the fuels are among the enumerated specific grades of fuel listed in that section, or are residual fuel oils; and that fuel oils used for manufacturing or production purposes which do not fall within either of the above definitions are not "heating oil" within the meaning of the applicable provisions.

PROPOSED ORDER

The matter is remanded to the department for further proceedings on the appellant's claim, consistent with the above analysis and findings.

by
Karen L. Godshall
State Hearing Officer